IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/07/2003

CORAM

THE HON'BLE MR.JUSTICE S.R. SINGHARAVELU

SECOND APPEAL NO.1797 OF 1992

N. Rengasamy .... Appellant

-Vs-

S. Ganesan
.... Respondent

Second Appeal filed under Section 100 Civil Procedure Code against the judgment and decree made in A.S.No.4 of 1988 on the file of the Sub Court, Periakulam dated 28.2.1991 reversing the judgment and decree made in O.S.No.148 of 1986 on the file of the District Munsif, Uthamapalayam.

!For appellant : Mr.P.T.S. Narendra Vasan

^For respondent : Mr.P. Pandi

:JUDGMENT

The plaintiff in O.S.No. 148 of 1986 on the file of District Munsif Court, Uthamapalayam had preferred this Second Appeal, since a decree passed in his favour in the trial court was reversed in the first appellate Court.

2. The brief facts of the case are as follows
The defendant, on borrowing a sum of Rs.5,000/- from the plaintiff had executed a Pronote on 6.4.1983 for the said sum, agreeing to repay the same on demand with interest and the said pronote was shown to have been attested by Rajendran, As no amount was paid despite reminders, the suit was filed for recovery of the sum due on pronote.

3.The defendant filed his written statement, wherein it was contended as follows:
The alleged execution of the pronote is specifically denied. It is not supported with any consideration. The defendant was employed under one Gopal of Paraithodu in Kerala District, who had an estate. Since there were union activities against the employer, there was some misunderstanding between the latter and the defendant and so, the blank pronote forms containing the signature of the defendant available in the hands of Gopal were handed over to the plaintiff, who is the present employee of Gopal and thus, the suit was

foisted against the defendant.

4.On the above pleadings, the following issues were framed by the trial Court:
1. Whether the plaintiff is entitled for the suit amount?
2. Whether the suit pronote was executed by the defendant?
3. Whether there was any consideration for the suit pronote?
4. Whether the defendant had signed the blank pronote forms?
5. Whether the blank pronote form containing the signature of the defendant was fabricated into suit pronote?

5. The plaintiff besides examining himself as P.W.2, had examined one Ramkumar, the Accountant of Mercantile Bank as P.W.1 and marked Exs.A.1 to A.3. The defendant, besides examining himself as D.W.1, had examined the attestor to the suit pronote as D.W.2 and marked Exs.B.1 to B.3.

6. On consideration of both oral and documentary evidence, the trial Court has decreed the suit, which in the first Appellate Court was reversed dismissing the suit and so, the plaintiff has preferred this appeal.

7. During the course of admission, the following substantial questions of law were framed:
1. Whether the lower appellate Court is correct in holding that the correction carried out in doucment marked as Ex.A.2 correcting the Tamil month and year to corroborate the English Calendar date will amount to material alteration?

2. Whether the lower appellate Court is correct in reversing the well considered judgment of trial Court merely on the ground of material alteration in Ex.A.2, particularly when the execution and the consideration passed thereon were admitted and proved?
3. Whether the lower appellate Court is correct in holding that no amount of evidence can be looked into without pleadings in plaint, particularly when the plaint was filed with specific pleadings and the same were proved by oral and documentary evidence. All the evidence cannot be put in pleadings?

4. Whether the lower appellate Court is right in holding that the evidence of D.W.2 is acceptable in respect of attestation made in A2, particularly when there is contradiction in D.W.2's evidence in respect of the same?

8. Ex.A.2 is the suit pronote dated 6.4.83 purported to have been executed by the defendant in favour of the plaintiff on the said day for a sum of Rs.5,000/-, agreeing to repay on demand the sum due thereon. The said pronote was shown to have been attested by Rajendran and he was examined as D.W.2. The signature of defendant found in Ex.A.2 was marked as Ex.A.1 and such signature was admitted. For passing of consideration also, the plaintiff had examined one Ramkumar as P. W.1, who happened to be the accountant in the Mercantile Bank, from where the defendant had drawn a sum of Rs.5,000/- from the account of the plaintiff, through X.1 Challan.

9. What the defendant examined as D.W.1 would contend is that while he was working under the estate of one Gopal, there was misunderstanding between the two, due to union activities and in that circumstance, the defendant happened to leave blank signed pronote form to Gopal, which later on delivered to the latter's employee, the plaintiff in order to foist a case and to wreck vengeance.

10. Ex.B.1 is the proceedings of the High Court in O.P.No.5623/83, which relates to the estate of Eswari Met. Ex.B.2 shows that there was an agreement between the estate owner and the employees. Although these factors are there, it has no barring with the case of the defendant that he had handed over signed blank pronote forms to Gopal. No circumstance was explained by defendant as to under which he was necessitated or forced to have delivered signed blank pronote forms to Gopal and in the absence of such circumstance the trial Judge had rightly disbelieved the version of the defendant by describing it as a device to escape from the liability of the suit pronote.

11. When once the signature of the defendant was admitted in the suit pronote, the legal presumption under Section 118 of Negotiable Instruments Act would go to support the case of execution of the pronote. Therefore, despite the contra evidence of the attestor of Ex.A.1, since the promisor had admitted his signature in the disputed pronote, the legal presumption will start to operate and it is for the other side to successfully rebut the same.

12. In such process of rebuttal, the passing of consideration of suit pronote under Ex.A.1 will work against the defendant and such passing of consideration was not only spoken to by the oral testimony of P.W.1 an uninterested independent stranger witness, who is the accountant, working in the Mercantile Bank of that place, wherefrom the defendant drew a sum of Rs.5,000/- under Ex.X.1, but also the documentary evidence of the latter, which would unclinchingly show the passing of consideration. The defendant did not say as to how and in what different transaction, he happened to draw a sum of Rs.5,000/- under Ex.X.1 and in the absence of which the plaintiff's case is believable. Thus, in the process of rebutting the legal presumption under Section 118 of Negotiable Instruments Act, when we expect some evidence in discharge of such burden on the part of defendant, what is available is only the evidence on the side of the plaintiff to support the pronote. Thus, the execution gets proved.

13. The lower appellate Court happened to reverse the judgment on the ground of material alteration, which has been dealt with as follows under Sec.87 of Negotiable Instruments Act:
"Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties".

14. True, it is that there is an alteration in the Tamil version of the date of execution of the suit pronote. Originally, it was written as "Uj;nuhj;fhhp tUlk;" "rpj;jpih khjk;", which was struck off and was written as "Je;Jgp tUlk;" "g;'Fdp khjk;". This, according to the defendant is material

alteration invalidating the very pronote itself.

15. Whether it is a material alteration or a mere alteration without going into the root of the matter is a question now to be decided.

16. Reliance was placed by the respondent/defendant in ANIRUDHAN Vs THOMCO's BANK (A.I.R. 1963 SC 746)

17. The facts in that case are that the plaintiff bank had agreed to allow an over draft to the first defendant (Principal debtor) for Rs.20,000/- that the second defendant(Surety) executed a Bond (Bank Guarantee) for the repayment of Rs.25,000/- and when that was pointed out to the Principal Debtor, the latter made the alteration in the document by reducing the figure of Rs.25,000/- to Rs.20,000/-. So far the material alteration in the bank guarantee is concerned, the figure "5" in the amount of Rs.25,000/- was alleged to have been atered to "0" and in the words "Rupees twenty five thousand", the word "five" has been struck off. The case of the appellant/surety that Rs.5,000 /- in figures was altered into Rs.20,000/- by the addition of the figure "2" and alteration of figure "5" into "0" and the corresponding change in the words by the addition of the word "twenty" and the scoring out of the word "five" has not been believed. Thus, it was found that the original guarantee of Rs.20,000/- was only altered as Rs.25 ,000/-.

18. In the above case law, the earlier decisions were discussed and it is worthwhile to mention the same. The leading case by then was Pigots case (1614) 11 CO Rep 26b where Lord Coke stated the doctrine as follows:
"These points were resolved: 1. When a lawful deed is raised, whereby it becomes void, the obligor may plead non est factum, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed".
"Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by inter-lineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void .... So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void but if a stranger, without his privity, alters the deed by any of the said ways in any point material, it shall not avoid the deed"

19. The said doctrine was departed from in Aldous vs Cornwell (186 8) 3 QB 573 where Lush, J, had observed as follows:
"This being the state of the authorities, we think we are not bound by the doctrine of Pigot's case, (1614) 11 Co Rep 26b or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written".

20. A surety is considered a "favoured debtor" and his liability is

strictissimi jures. Lord Westbury, L.C., in Blest vs Brown, (1862) 45 ER 1225 stated this liability in the following words:
"It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end".

21. The above statement of the law in (1862) 45 ER 1225 was considered by theCourt of Appeal in Holme v Brunskill (1878) 3 QBD 495, where Lrd Cotton,L,J stated the law in these words:
"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial that it cannot be otherwise than beneficial to the surety, the surety may not be discharged;"

22. This dictum of Cotton,L.J., was quoted with approval by the Judicial Committee in Ward vs National Bank of Newzealand Ltd (1883) 8 AC 755.

23. By considering all these judgments, it was held in A.I.R. 1963 SC 746 (Official Assignee vs H. Basavanna) at paragraph-35 that the particular document in that case cannot be said to have been materially altered, because it has not been altered in such a manner as to change its nature and the alteration did not save the promisor from liability arising under it.

24. Thus, the proposition of the law made in the above said Supreme Court case was that an alteration is not material which carries out the intention of the parties already apparent on the face of the deed .. unsubstantial alteration in an instrument which is to the benefit of the surety do not discharge the surety from the liability.

25. In a later Single Bench Judgment of High Court of Andhrapradesh, this aspect was vividly discussed in 1966 Andhra Law Time Reports 1 14 (Subba Reddy vs Ramana Reddy). That was a case where the suit pronote was dated 29.7.1959. It was alleged that it contained material alteration of the very date "22" into "29" so as to make the suit within limitation. To be specific the date of pronote was originally 2 2.7.1959 and it was altered as 29.7.1959. The proposition of law after quoting Halsbury's Laws of England, III Edition, Vol.11, page 367, paragraphs 598 and 599, which we reproduce here under among other case laws has been laid down.
"598. A writing proposed to be executed as a deed may be altered by erasure or inter-lineation or in any other way before it is so executed, and any alteration so made before execution does not affect the validity of the deed. Any alteration, erasure or inter-lineation appearing upon the face of a deed is presumed, in the absence of evidence to the contrary, to have been

made before the execution of the deed".
599. If an alteration (by erasure, inter-lineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance, however, is not ab initio or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of such alteration, and so as to prevent the person, who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made"
26. In the above case law reported in Subba Reddy vs Ramana Reddy (1966 Andhra Pradesh Law Times Report), it was held as follows:
"It must be remembered that it is not any and every alteration that avoids the instrument. To have that effect, the alteration must be in a material particular. A material alteration can be brought about by change of date or time of drawing or of the place of payment or by change in the sum payable etc.,.. It is wrong to assume that the date of the promissory note is merely a description. It indicates the time when the promissory note was executed. In most cases, the date is very material in calculating the date of the performance of the contract and more often fixing the period of limitation within which the plaintiff will have to institute the suit on the foot of such promissory note. It is immaterial whether the alteration is made in the date or month or year. Any such alteration being material must necessarily result in the avoidance of the promissory not.
It is true in two cases, alterations, though material, do not vitiate the instrument; firstly, when the alteration is made before the promissory note is executed and secondly, if the alteration made was merely to correct a mistake or to make it what it was originally intended to be. As stated earlier, the Section (Section 87) itself states that the alteration can be made with the consent of the parties, or to carry out the common intention of the original parties.."

27. After having thus enunciated the principle to be followed on the question of material alteration as postulated under Sec.87of Negotiable Instruments Act, the above case law also laid down the law on the burden of proof, which is as follows:
"Where an instrument appears tobe materially altered, the law naturally casts heavy burden on the plaintiff to explain the alteration and show when it was made. Ordinarily, the party who presents a negotiable instrument which is an essential part of his case in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of the instrument unless he can satisfactorily explain the existing state of the document: See Mussamut Khoob Conwar vs Baboo Moodnarain Singh (I Mcores I A 1 at 17). It is true that this wholesome rule is not without its exceptions.
If there be, for example, independently of the instrument corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence, there must however be an explanation and such a strong proof to rebut the initial presumption. It is relevant to note that the presumption under the English Law is that in the case of deeds signed and sealed, alterations were made before execution, but no such presumption

exists in the case of negotiable instruments. The law on the subject has been thus stated in the Halsbury' s Laws of England, III Edition, Vol.11, Para 622, page 379;-
"A writing which is intended to be under hand only can be altered by erasure, or interlineation, or otherwise, before it is signed, but it lies upon the party who puts the instrument in suit to explain an alteration and show when it was made".

28. This being the position, let me now see whether any explanation has been offered by the plaintiff about the suspicious nature of the suit pronote in asmuch as it contained a correction of altering the words "Uj;nuhj;fhhp tUlk; rpj;jpiu khjk;, originally found in the suit pronote into Je;Jgp tUlk; g';Fdp khjk; We can take judicial note that the Tamil month of rpj;jpiu normally begin around 14th April of every English Calendar year subject to a correction of one day earlier and later. Since the suit pronote was dated 6.4.83 and over which there was no dispute, the corresponding Tamil month should only be "g'; Fdp" Therefore, the alteration of month of rpj;jpiu originally found in the suit pronote into g';Fdp was to give effect to the correct corresponding month of the admitted date of 6.4.83 found in the suit pronote. Similarly, when originally it referred to rpj;jpiu, naturally, it would be of the year Uj;nuhj;fhhp, which is the next year of Je;Jgp. When rpj;jpiu was rightly altered into the earlier month g'; Fdp, then the year of Uj;nuhj;fhhp should also be corrected to the corresponding year of 6.4.83 as Je;Jgp. In order to correct a mistake, this was done. Therefore,this may not be a material alteration to have the effect of avoidance of the pronote. All the points framed in this connection are in favour of the appellant/plaintiff except Point No.3, which is answered that normally evidence without plea on substantial matter may not be considered, and this aspect has no bearing upon the result.

29. Therefore, the appeal is allowed setting aside the judgment and decree of the lower Appellate Court and confirming that of trial Court. No costs.

Index: Yes
Web site:Yes

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To
1. The Sub Court, Periakulam
2. The District Munsif, Uthamapalayam

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